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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

16 MAUDER and ALICE CHAO;) Case No.: CV-10-3118-SBA
17 DEOGENESO and GLORINA PALUGOD;)
18 and) **PLAINTIFFS' RENEWED TRIAL PLAN**
19 MARITZA PINEL,)
20 individually and on behalf of all others)
21 similarly situated,)
22 Plaintiffs,)
23 vs.)
24 AURORA LOAN SERVICES, LLC,)
25 Defendant.)

26

1 **I. INTRODUCTION**

2 Plaintiffs Mauder and Alice Chao, Deogeneso and Glorina Palugod, and Maritza Pinel
 3 ("Plaintiffs") propose to represent two classes and a subclass, as follows. First, a class of persons
 4 like themselves to whom Aurora sent standard form correspondence (the "Workout Agreement")
 5 that violates California's Rosenthal Fair Debt Collection Practices Act, CAL. CIV. CODE §§ 1788,
 6 *et seq.* (the "Rosenthal Act") on or after June 8, 2009¹ (the proposed "Rosenthal Class").

7 Second, Plaintiffs seek to represent a class of persons like themselves to whom Aurora
 8 sent a Workout Agreement after June 8, 2006², who made the payments required under the
 9 Workout Agreement, but were not provided a review for modification or other opportunity to
 10 cure their arrearage during the term of the Workout Agreement, subsequently lost their homes to
 11 foreclosure, and are thus entitled to restitution of their trial payments and/or contractual damages
 12 as set forth in the SCAC (the proposed "Restitution Class").

13 Third, Plaintiffs seek to represent a subclass of persons like themselves who are
 14 members of the Restitution Class and made additional payments to Aurora after the end of their
 15 Workout Agreement (the proposed "Excess Payment Subclass").

16 **II. PLAINTIFFS WILL USE COMMON EVIDENCE TO OBTAIN AN
 17 AGGREGATE JUDGMENT IN FAVOR OF THE CLASSES AND SUBCLASS**

18 Plaintiffs will use common evidence to obtain an aggregate judgment in favor of the
 19 Rosenthal Class, the Restitution Class and the Excess Payment Subclass. *See In re Worldcom,*
 20 *Inc. Secs. Litig.*, 2005 WL 517331, at *4 (S.D.N.Y. 2005) (benefits of aggregate damage award
 21 in class action).

22 For the Rosenthal Class, the amount of the judgment is capped at \$500,000, and is to be
 23 determined by the Court based on articulated, class-action-specific, common factors, specifically
 24 "the frequency and persistence of noncompliance by the debt collector, the nature of such
 25 noncompliance, the resources of the debt collector, the number of persons adversely affected,

26 ¹ The Rosenthal Act has a one-year statute of limitations, thus only those borrowers who were
 27 sent the Workout Agreement within one year prior to the filing of the *Pinel* complaint are in the
 28 Rosenthal Class.

29 ² The remaining claims for relief in the SCAC have a four-year statute of limitations, thus the
 30 Restitution Class includes all those sent the Workout Agreements on or after June 8, 2006.

1 and the extent to which the debt collector's noncompliance was intentional." 15 U.S.C. §
 2 1692k(b)(2). Each and every one of these factors is Class-wide evidence concerning Aurora and
 3 its practices vis-à-vis the Rosenthal Class as a whole.

4 For the Restitution Class, which consists of borrowers sent the Workout Agreement who
 5 made the payments required by their Workout Agreement but were not provided an opportunity
 6 to cure their arrearage after successful completion of their Workout Agreement, and then lost
 7 their homes to foreclosure, the judgment under Count VII (Unfair Competition Law) will include
 8 an order of restitution of the aggregate amount of the trial period payments they made to a
 9 common fund for their benefit. CAL. BUS. & PROF. CODE § 17203. Plaintiffs also seek to recover
 10 these same funds as damages under the Rosenthal Act (Count V), damages under their breach of
 11 contract claims (Counts III & IV), and/or damages under their quasi-contract claims (Counts I,
 12 II, & VI).

13 For the Excess Payment Subclass, which is defined to include members of the Restitution
 14 Class who made additional payments to Aurora after the term of the Workout Agreement, the
 15 judgment will include an order of restitution/damages (as noted under each claim above),
 16 constituting the payments Excess Payment Subclass members made to Aurora after the term of
 17 their Workout Agreements expired.

18 Specifically, Plaintiffs propose to proceed post-certification through trial as follows:

19 **A. Pre-trial proceedings**

20 **1. Rosenthal Class list**

21 Attached hereto as Exhibit A is the Rosenthal Class list. This list sets forth the loan
 22 number and date for each borrower to whom Aurora sent a Workout Agreement in California on
 23 or after June 8, 2009. Based on the information provided to date by Aurora, and its discovery
 24 verifications, Plaintiffs believe this list to be accurate and complete. That is, it contains all
 25 California borrowers who received a substantially identical Workout Agreement as Plaintiffs
 26 during the statute of limitations period applicable to the Rosenthal Act claim. From this list of
 27 loan numbers, Aurora can generate a class notice list including loan numbers, names, last known
 28 address, and so forth through electronic queries.

1 **2. Restitution Class List³**

2 Attached as Exhibit B is Plaintiffs' preliminary Restitution Class list. This list contains
 3 the loan number associated with each borrower in California who: (1) was sent a Workout
 4 Agreement on or after June 8, 2006; (2) made all the payments required by the Workout
 5 Agreement; and (3) did not get an opportunity to cure and was, therefore, foreclosed. The
 6 Restitution Class list sets forth the total amount paid to Aurora under the borrower's Workout
 7 Agreement. If liability is established, the Restitution Class list can be used to calculate the pro-
 8 rata amount of the aggregate restitution/damages award to be sent to each Restitution Class
 9 member.

10 **3. Excess Payment Subclass List**

11 Attached as Exhibit C is Plaintiffs' preliminary Excess Payment Subclass list. The
 12 Subclass list contains the loan number for each Restitution Class member who made payments to
 13 Aurora after the end of their Workout Agreement term. The list sets forth the total amount of
 14 such payments made. If liability is established, the Excess Payment Subclass list can be used to
 15 calculate the pro-rata amount of the aggregate restitution/damages award to be sent to each
 16 Excess Payment Subclass member.⁴

17 **4. Notice**

18 As the class lists include mortgage loan numbers and associated information, the notice
 19 can be sent to each class member's last known home address or forwarding addresses obtained
 20 by reference to the home address. To the extent that Aurora maintains electronic data such as

21 ³ As noted in Plaintiffs' class certification brief, on the eve of the filing of this trial plan, counsel
 22 for Aurora sent an email to Plaintiffs' counsel indicating Aurora intended to provide updated
 23 class membership data. *See Declaration of Thomas E. Loeser in Support of Plaintiffs' Renewed*
Motion for Class Certification, ¶¶ 21-22. The updated data will not change Rosenthal Class
 24 membership. *See id.* To the extent it changes class membership and damages/restitution amounts
 25 for Restitution Class members and Excess Payment Subclass members, Plaintiffs will provide
 updated Class lists and damages calculations with their reply. The new data will not change the
 process described in this Trial Plan.

26 ⁴ The Excess Payment Subclass list, as currently constituted with 1,538 loan numbers and a total
 27 of \$8,566,063 in post-plan payments, conservatively states the number of Excess Payment
 28 Subclass members and therefore, the full measure aggregate damages. Additional data, as set
 forth above in Note 3, may identify additional Restitution Class members. To the extent such
 additional Restitution Class members made post-plan payments, they would also be Excess
 Payment Subclass members.

1 email addresses and social security numbers associated with loan numbers, those may be helpful
 2 for tracing purposes.

3 **5. Calculation of Aggregate Damages**

4 Aggregate damages for the Rosenthal Class are capped at \$500,000. For the Restitution
 5 Class and the Excess Payment Subclass, the respective Class and Subclass list will provide the
 6 precise amount of damages/restitution for each Class and Subclass member. To the extent
 7 judgment exceeds (through punitive damages) or is less than (for example, if notice costs or fees
 8 are drawn from an aggregate award) the total of the payments set forth in the Class and Subclass
 9 lists, amounts to be sent each class member based upon the pro-rata share of the aggregate can be
 10 easily calculated.

11 **B. Common Trial Evidence**

12 Assuming trial of the Rosenthal Act, contract claims, quasi-contract claims and UCL
 13 liability and damages occur at the same time, all issues may be determined based on the
 14 following evidence:

15 1. The Workout Agreement, on the issue of whether it is deceptive under the
 16 objective “least sophisticated debtor” standard of the Rosenthal Act;
 17 2. The Workout Agreement, on the issue of whether it was unconscionable and/or
 18 lacking in consideration or there was a failure of consideration;
 19 3. The Workout Agreement, if enforceable, on the issue of what contractual
 20 obligations and benefits imbued to Class members and Aurora;
 21 4. Aurora’s policies and practices regarding the Workout Agreement program,
 22 through its 30(b)(6) designees Helen Placente and Steven Froning, and other yet
 23 to be determined witnesses. This evidence will be offered on the issues of (1)
 24 Aurora’s interpretation of the Workout Agreement; (2) whether the Workout
 25 Agreement was deceptive, unconscionable, and/or lacking in consideration; (3)
 26 Aurora’s program of incentivizing employees to convince borrowers to enter into
 27 Workout Agreements; (4) Aurora’s policy of encouraging borrowers to continue
 28 to make payments after their Workout Agreements ended; (5) Aurora’s profit
 maximization and expense minimization benefits of placing borrowers in
 Workout Agreements; (6) the timeliness of review for modification under the
 Workout Agreements; (7) the lack of provision of an opportunity to cure arrearage
 under the Workout Agreement; (8) the dual-tracking of Workout Agreements with
 foreclosure; (9) the affirmative issue of damages; (10) the authentication of
 Aurora’s documents (if necessary); (11) punitive damages; and (12) other matters
 as may become apparent during further discovery. It will also be offered against
 Aurora’s presumed defense to the Rosenthal Act that its violations were “not
 intentional and resulted notwithstanding the maintenance of procedures
 reasonably adopted to avoid” them. *See CAL. CIV. CODE § 1788.30(e).*

1 5. Documents provided by Aurora in discovery that: (1) support and/or refute the
 2 testimony of its corporate designees; (2) reveal its actual practices and policies;
 3 (3) reveal its intent and its motivation for undertaking the Workout Agreement
 4 scheme; (4) contradict statements/promises in the Workout Agreements; (5) show
 5 its actual interactions with Plaintiffs and the Classes and Subclass; (6) show its
 6 review of its own adherence to policies and procedures; (7) demonstrate its
 7 treatment of borrowers who entered into Workout Agreements; (8) are relevant to
 8 punitive damages; and (9) are relevant to other matters that may be admitted at
 9 trial based on information that becomes apparent through further discovery and
 10 developments in this case.

11 6. Prior versions showing the history of the evolution of the Workout Agreement
 12 into the subject forms, on the issue of intent, for the purposes of damages (15
 13 U.S.C. § 1692k(b)(2); CAL. CIV. CODE § 1788.30(e)), as well as for the purposes
 14 of contractual intent and meaning.

15 7. Reports of Workout Agreement outcomes and restitution/damages, for the
 16 purposes of damages and the merits. 15 U.S.C. § 1692k(b)(2); CAL. CIV. CODE §
 17 1788.30(e).

18 8. Plaintiffs will testify regarding the facts of their case in order to lay the foundation
 19 for the Classes and Subclass.

20 9. Post-certification discovery is likely to reveal additional Aurora personnel and
 21 documents relevant to these matters.

13 **III. POST TRIAL ADMINISTRATION**

14 Plaintiffs will request a verdict specifying (1) Rosenthal Act liability and statutory
 15 damages; (2) contractual rescission and punitive damages (to the extent there is a finding of
 16 fraud in the inducement); (3) disgorgement; and (4) restitution damages; and the aggregate
 17 amount payable to (1) the Rosenthal Class; (2) the Restitution Class; and (3) the Excess Payment
 18 Subclass. These funds will be distributed to the Classes and Subclass through an administrative
 19 process to be determined following class certification. *See* 7AA C. WRIGHT, A. MILLER & M.
 20 KANE, FEDERAL PRACTICE AND PROCEDURE § 1784 (3d ed. 2005) (“courts must use their
 21 discretion [] and ... ingenuity [] to shape decrees or to develop procedures for ascertaining
 22 damages and distributing relief”). To the extent a there is a residual of undeliverable funds,
 23 Plaintiffs will propose a *cy pres* recipient that provides assistance to financially distressed
 24 homeowners such as the members of the Classes and Subclass.

1 DATE: November 16, 2012

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